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FILE NO.: 11688.0006.

May 24, 2018

SENT BY EMAIL AND REGULAR MAIL

Sharon E. Kivowitz, Esq.
Office of Regional Counsel
US Environmental Protection Agency, Region 2
290 Broadway, 17th Floor
New York, New York 10007

Re: Unilateral Administrative Order for Remedial Design of OU-1– New Cassel/Hicksville Groundwater Contamination Superfund Site
Index No. CERCLA-02-2018-2015

Dear Sharon:

As you know, we represent Arkwin Industries, Inc. ("Arkwin") in the above referenced matter. We acknowledge receipt of your email containing your letter dated March 22, 2018, and the United States Environmental Protection Agency ("EPA") Unilateral Administrative Order, as amended on May 17, 2018, and effective May 21, 2018 (collectively, the "UAO").

Arkwin submits this Notice of Intent to comply with the UAO and, subject to the comments below, to conduct the work related to the Central Plume as enumerated in the Appendix 1 Operating Unit ("OU) – 1 Statement of Work ("SOW"). This letter is provided to you, in accordance with paragraph 49 of the UAO requiring written notice of intent to comply within three (3) days of the Effective Date of the Order. Hence, this letter is timely submitted. A hard copy to EPA is forthcoming in the regular mail.

This Notice of Intent to Comply by Arkwin is not and should not be deemed as an admission of liability for any purpose. All defenses available to Arkwin to CERLCA liability for the New Cassel/Hicksville Ground Water Contamination Superfund ("NCHCGWS") Site are explicitly reserved. Moreover, Arkwin's right to seek third-party contribution shall not limited in any manner by Arkwin's agreement to comply with the UAO and or the NCHCGWS Site.

I. SUFFICIENT CAUSE

A. Reservation of Rights and Standard for "Sufficient Cause"

1. Notwithstanding the foregoing statement of its intent to comply, pursuant to paragraph 50 of the UAO, Arkwin is setting forth below, its "sufficient cause" defenses under the Comprehensive Environmental Reclamation and Liability Act ("CERCLA") §106(b), 107§ (c)(3), 42 U.S.C. §§ 9606(a) and 9607(c)(3). Accordingly, Arkwin reserves its right to raise any "sufficient cause" defense, or any information in support thereof, at a later date, whether or not mentioned in this letter or existing or known to Arkwin at the time of this letter.

2. Sections 106(b) and 107(c)(3) of CERCLA provide that a party is not subject to treble damages or civil penalties if that party has "sufficient cause" not to comply with a UAO. Parties have "sufficient cause" if they have a reasonable belief that they are not liable under CERCLA or can show that the applicable provisions of CERCLA, the National Contingency Plan ("NCP") or applicable guidance give rise to an objectively reasonable, good faith belief in the invalidity or inapplicability of the UAO. *See, Solid State Circuits, Inc. v. United States Environmental Protection Agency*, 812 F.2d 383, 390 (8^{1h} Cir. 1987).

B. <u>Arkwin has "Sufficient Cause" Because Its Liability, if any, is Divisible</u>

3. Assuming, *arguendo,* that Arkwin is a liable party, the UAO requires Arkwin to perform and participate jointly and severally in the Central Plume portion of the Preliminary Design Investigation / Remedial Design, and jointly and severally with all other Respondents for the "Common Work Elements" (see paragraphs 54(a) and 54(c) of the UAO, respectively). However, liability under CERCLA is not joint and several if the harm caused by a party is divisible - either because the harm is distinct or is reasonably capable of apportionment. *Burlington N. & Santa Fe Railway (BNSF) v. United States,* 556 U.S. 599 (2009). Arkwin's liability, if any, is divisible. As noted in the *BNSF* case, the divisibility of harm does not need to be exact or complete, and even a 50% margin of error in the data would be acceptable. *Id.* at 616-17. Once the harm is determined to be divisible, each potentially responsible party is only liable for the harm that it caused. As has been amply noted in prior correspondences and presentations by and to the EPA, each of the three plumes were separately designated at the NCHGWCS based on different signature compounds at the Eastern, Central and Western Plumes. The differentiation was based on the variations of what was allegedly discharged at each of the Respondent properties, and in what volume, and for how long.

C. Arkwin has "Sufficient Cause" because EPA's Selection of the Remedy is <u>Arbitrary, Capricious and not Otherwise in Accordance with Law.</u>

1. Arkwin's comments on the PRAP for the Site dated April 26, 2013, which are incorporated by reference fully herein, set forth a non-exclusive list of reasons why EPA's remedy selection is arbitrary, capricious, not otherwise in accordance with law and inconsistent with the NCP.

2. EPA failed to thoroughly evaluate the site under CERCLA and NCP prior to selecting the remedy. The SOW attached to the UAO is based on defective and stale sampling data, and significant data gaps exist. Yet EPA expects the Respondents to engage considerable resources to design a remedy which likely will not be effective, and never be used, because of EPA's failure to fully evaluate the OU-1 at NCHGWCS.

D. Arkwin has "Sufficient Cause" Because EPA Failed to Address Fundamental Flaws in its Remedy Selection

1. EPA chose a flawed remedy for OU-1 based on an underdeveloped conceptual site model and incorrect conclusions. EPA's disregard to consider more recent and comprehensive data as well as lengthy, substantive comments offered by the Respondents following the issuance of the Proposed Remedial Action Plan ("PRAP") before EPA summarily issued its Record of Decision ("ROD"), is *prima facie* evidence of arbitrary and capricious decisions by the EPA.

2. The ROD does not adequately address community impacts. EPA did not provide sufficient opportunity for a public meeting in the affected area.

3. EPA did not provide sufficient comment to each of the public comments and criticisms submitted in response to the public meeting and PRAP.

E. Arkwin has "Sufficient Cause" Because the UAO does not Describe the Threat as "Imminent and Substantial".

1. Under CERCLA § 106(a) EPA has the authority to issue only "such orders as may be necessary to protect human health and welfare and the environment," when it "determines that there may be imminent and substantial endangerment to public health or the environment because of an actual or threatened release of a hazardous substance from a facility." 42 U.S.C. § 9606(a).

2. According to the Supreme Court, a threatened injury that might occur "some day" in the future without "any specification of when the some day will be is not imminent". *Lujan v. Defenders of Wildlife*, 503 U.S. at 564; *id.* at 563 n. 2.

3. In this case, the UAO is lacking any factual basis to support a finding of imminent and substantial endangerment. As can be gleaned from the site history set forth in the UAO, the contamination was initially discovered at the site in the 1980s. The Bowling Green Water District implemented both the granulated activated charcoal system in 1990 and an air stripper in 1995 to fully address the issue. These systems have operated for almost three decades, and no substantial, and certainly no imminent, endangerment has occurred, or is threatened to occur.

4. Accordingly, the issuance of the UAO is in derogation of CERCLA and common law.

II. CONCLUSION

Arkwin intends to comply and continue to cooperate with EPA in implementation of a PDI / RD that is based on sound science, in compliance with CERCLA and the NCP and on a schedule that is feasible and consistent with Arkwin procurement and other rules.

Very truly yours,

s/Suzanne M. Avena

Suzanne M. Avena

cc: All PRP Counsel (via email)
A. Crossman